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## The Mass Age of Internet Law<sup>1</sup>

Daithí Mac Síthigh<sup>2</sup>

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### 1. The Mass Age

The popularity of ‘user-generated content’ represents the fulfilment of many optimistic predictions about ‘new media’.<sup>3</sup> Videos made on a €100 digital camera can be uploaded to YouTube using relatively basic computer skills, with no prerequisites of media production training – or indeed any knowledge of media or Internet law. Others use inexpensive software to edit and remix videos and songs, then upload them to the Web. Blogging is a popular pursuit; setting up a blog requires little effort – and indeed, given that typical bloggers use a hosted service or a template on a self-hosted site, the gap between the look and feel of professional and amateur productions is significantly reduced in the case of blogging. Wikipedia’s popularity continues to grow. Podcasting is starting to take off, with BBC and backyard productions happily coexisting in the iTunes universe, and awareness of podcasts and podcasting continuing to grow. Broadcasters and newspapers encourage their audiences to contribute their ‘own’ content to websites.

The boom in the creation of what is recognised as new media (or something similar to media in form or in content) is an element in what I call the ‘mass age’

<sup>1</sup> The title for this piece is based on Marshall McLuhan’s exploration of the potential for puns on his own ‘medium is the message’; his 1967 book *The Medium is the Message* included some use of the mass age / massage terms. I also wish to acknowledge helpful discussions with Dr. Dan McQuillan and Rachel Cobcroft, feedback from audiences at the Society of Legal Scholars (SLS) and British & Irish Law, Education & Technology Association (BILETA), assistance from SLS cyberlaw convenor Prof. Steve Hedley, and advice from my doctoral supervisor Dr. Eoin O’Dell (none of whom bear any responsibility for what follows).

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<sup>3</sup> This section relies on a range of general and statistical sources. On user engagement and participation, see the results of the SPIRE project at Oxford University: ‘Results and analysis of the Web 2.0 services survey undertaken by the SPIRE project’ (11 June 2007), [http://spire.conted.ox.ac.uk/trac\\_images/spire/SPIRESurvey.pdf](http://spire.conted.ox.ac.uk/trac_images/spire/SPIRESurvey.pdf). On social networking and age-related participation, see for example W Dutton and E Helsper, *The Internet In Britain 2007* ([http://www.oii.ox.ac.uk/research/oxis/OxIS2007\\_Report.pdf](http://www.oii.ox.ac.uk/research/oxis/OxIS2007_Report.pdf)). On video, see Pew Internet & American Life Project, ‘Online Video’ (January 2008), <http://pewresearch.org/pubs/682/online-video-audience-surges>. On podcasting, see the work of Edison Media Research, e.g. ‘The Podcast Audience Revealed’ (19 March 2007), [http://www.edisonresearch.com/home/archives/2007/03/the\\_podcast\\_aud.php](http://www.edisonresearch.com/home/archives/2007/03/the_podcast_aud.php). I found the following reports on new media and Web 2.0 helpful: UNESCO, *New Media: The Press Freedom Dimension*, <http://unesdoc.unesco.org/images/0015/001520/152017e.pdf> (February 2007); OECD, ‘Participative Web: User-Created Content’ (DSTI/ICCP/IE(2006)7, 12 April 2007); H Green & C Gannon, ‘Their Space: Education for a Digital Generation’, <http://www.demos.co.uk/files/Their%20space%20-%20web.pdf>.

of Internet law. By this, I mean that the theories and questions developed in the earlier days of Internet law, such as jurisdiction, intermediary liability, debates over freedom of expression and so on are not only abstract or theoretical, but are issues that are likely to be relevant to the 'average' Internet user. Of course, legal solutions to questions like who is liable for what is posted on Usenet or bulletin boards have been under consideration for some time. However, there is of course a social difference between systems developed in relation to a technology used by an extremely small minority of 'early adopters' and those used generally, and thus I highlight the current period of growth in 'user-generated content' as being of particular interest. When everyone (or a large section of users) is a producer, those subject to the diverse facets of Internet law are a correspondingly significant group of persons.

The development of social networking sites (Myspace, Facebook, Bebo), blogging platforms (Blogger, Wordpress.com) and video sites (YouTube, DailyMotion, etc) means that uploading and sharing everything from personal data to self-created music, videos, thoughts, threats and bad poetry is relatively straightforward.<sup>4</sup> The audiences for rich content are large; during 2007, the regular audience of online video sites in the US grew to around half of adults with regular Internet access.<sup>5</sup> It is no surprise, too, that levels of participation (as compared with lurking) are increasing for the various new services making a greater number of people potential 'producers' or 'creators' rather than mere users or members of an audience. For example, a majority of Americans who shoot video now also post it online<sup>6</sup> and of course, these sites typically show high levels of use and engagement.

Far-reaching assertions about the importance and transformative nature of such sites are made by many. For example, an OECD working paper reported that the 'rise – or return – of the amateur' may 'result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless.'<sup>7</sup> The engagement of youth is significant; British thinktank Demos noted that 'Almost all [young people] are now also involved in creative production, from uploading and editing photos to building and maintaining websites'.<sup>8</sup>

Although I focus on user-generated content in this paper, the mass age is also a reflection of other trends, such as the number of users of auction service eBay, the volume of online shopping transactions, and indeed the sheer number of Internet connections across the world. It is appropriate, then, that our theoretical framework of cyberlaw continues to be elaborated in this mass age. Jonathan Zittrain calls on us to move on from domain names and network neutrality and to engage in a debate about the future of the network and of regulation in general.<sup>9</sup> Indeed, it may be fair to say that the two solitudes of the cyberanarchists (or the cyberseparatists) against the cyberpaternalists - and the

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<sup>4</sup> 'Participative Web' (n 3).

<sup>5</sup> 'Online Video' (n 3)

<sup>6</sup> 'Online Video' (n 3).

<sup>7</sup> OECD (n 3).

<sup>8</sup> Green & Gannon (n 3).

<sup>9</sup> J Zittrain, 'The Generative Internet' (2006) 119 Harvard Law Review 1997, 1978-9, 1996.

subsequent work of Lessig and others - give way as so much Internet law 'activity' takes place. The question, I believe, changes from '*should* the Internet be regulated?' and '*will* the Internet be regulated?' (the early debates), through '*how should* the Internet be regulated?' and '*how will* the Internet be regulated?' (the Lessig discussions) to, in the current era, '*how is* the Internet being regulated?'<sup>10</sup> In part 2, I review the current legal situation in terms of freedom of expression in particular; in part 3 I set out various ways in which legal or social responses are possible, and conclude with some general reflections on the regulation of new web services in part 4.

## 2. From Mass Age To Massage

While those who favour strong protection of freedom of expression can look at the history of the Internet (and indeed selected moments from the history of Internet law)<sup>11</sup> and assume that the state of speech is strong, this state of affairs should not be taken for granted. The technological features that (for reasons related to or unrelated to theories of free speech) appear to favour strong protection of speech rights do not mean that such advocates can sit back and reflect on their successes. The architecture of the Internet, if changed, can have a different relationship with expression (as compared with historical and existing systems)<sup>12</sup> and this, of course, means something in Internet law. Control of expression by governments remains possible, in particular through the control of gatekeepers such as credit card merchants, postal services and others.<sup>13</sup> Conflicts between legal systems interest not just the student of private international law but also the publisher of potentially controversial or actionable content: the apocalyptic predictions at the time of the *Gutnick* case may not have come true,<sup>14</sup> but neither is it prudent for publishers to ignore the lessons of *Gutnick* and other cases from the earlier period of Internet law.

<sup>10</sup> Berman's discussion of three generations of cyberlaw follows a similar structure: preface to *Law and Society Approaches to Cyberspace* (Aldershot: Ashgate, 2007). Although he does not discuss it, I would add that Goldsmith and Wu (J Goldsmith & T Wu, *Who controls the Internet? Illusions of a borderless world* (Oxford: OUP, 2006)) fit neatly into third-generation (or how-is) scholarship.

<sup>11</sup> For example, *ACLU v Reno* (1997) 521 US 844, *per* Stevens J: 'Thus, some of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers ... Those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry' (868).

<sup>12</sup> L Lessig, *Code version 2.0* (New York: Basic Books, 2006), ch 5.

<sup>13</sup> Goldsmith & Wu (n 10)

<sup>14</sup> *Dow Jones v Gutnick* [2002] HCA 56. Publishers and media organisations intervened in the case and made the argument that finding for Gutnick (who alleged that an article on a US website could be considered in defamation proceedings in Australia) would make Internet publishing extremely difficult. The judges dismissed this 'spectre' as 'unreal'; in practice, the decision has not opened the floodgates for Internet defamation claims. See J Reidenberg, 'Technology and Internet Jurisdiction' (2005) 153 *University of Pennsylvania Law Review* 1951 (arguing that Gutnick and other cases represent the defence of legal systems against attack); N Garnett 'Dow Jones & Co. v. Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?' (2004) 13 *Pacific Rim J of L & Policy* (arguing that the impact is overstated); B Fitzgerald, 'Dow Jones v Gutnick: Negotiating "American Legal Hegemony" in the Transnational World of Cyberspace' [2003] *Melbourne U L Rev* 21 (arguing that the case shows divergence and diversity between national laws and should encourage accommodation rather than conflict); M Saadat, 'Jurisdiction and the Internet after Gutnick and Yahoo!' [2005] 1 *J of*

In this paper I am particularly interested in the practical role played by non-state actors (whether for commercial or legal reasons) in shaping Internet law as *perceived by the user*. I argue that this represents the massage as well as the mass age of Internet law – the hands of the legal persons that are shaping and reshaping the law of the Internet through their own actions.<sup>15</sup> This problem can be observed as one of particular significance in the context of new web applications, particularly those characterised as ‘social networking’ or ‘web 2.0’, where vast amounts of rich content, important data and interpersonal connections are facilitated by powerful hosts, household names like Facebook and YouTube.

YouTube, purchased by Google for some \$1.6bn, is one of the most popular websites in the world (at the time of writing).<sup>16</sup> It is the subject of a series of high-profile lawsuits<sup>17</sup> and thousands of newspaper articles (without even beginning to count blog posts that mention or link to the site). YouTube is, of course, among the most significant hosts of user-generated content or amateur video content in the world, occupying significant user time and attention<sup>18</sup> and although many competing sites exist, it cannot be doubted that for at least some significant proportion of ordinary users, YouTube *is* user-generated video (although, of course, not all of the content on YouTube is in fact user-generated; some of it is simply content ripped without editing from TV, DVDs etc).

It could be argued, through looking at explicit State action alone, that videos posted on YouTube are not ‘regulated’. There is no YouTube Act, and the videos are hosted in the speech-friendly US. Existing Broadcasting Acts are unlikely to apply to YouTube uploaders or even to the site as a whole, due to technological definitions of broadcasting included in the statute or in caselaw. This, though, is a dated interpretation of regulation, and would be an incomplete assessment of YouTube. Regulation of YouTube videos (and the producers of

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Internet L & Tech, [http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005\\_1/saadat/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2005_1/saadat/) (arguing that the case has not had the predicted impact on online expression).

<sup>15</sup> Others have been addressing this question recently: see S Kreimer, ‘Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link’ (2006) 155 U Penn L Rev 12; J Zittrain, ‘A History of Online Gatekeeping’ (2006) 19 Harvard J of L & Tech 253; C Ahlert, C Marsden & C Yung, ‘How “Liberty” Disappeared from Cyberspace: The Mystery Shopper Tests Internet Content Self-Regulation’ (2005, Report, Programme in Comparative Media Law and Policy, <http://pcmlp.socleg.ox.ac.uk/text/liberty.pdf>). Detailed work on self-regulation has been carried out by D Tambini, D Leonardi & C Marsden (eds), *Codifying Cyberspace : communications self-regulation in the age of Internet convergence* (London: Routledge, 2007). A particularly amusing treatment of the speech-related issues, focused on IP, is included in K McLeod, *Freedom Of Expression: Resistance and Repression in the Age of Intellectual Property* (Minneapolis: University of Minnesota Press, 2007)

<sup>16</sup> Website ranking is notoriously difficult. Alexa.com ranks YouTube as the ‘fourth most popular’ and estimates a daily reach of approximately 14% of the Internet audience. In the UK, where the use of video websites increased by 178% in the last year alone, YouTube is the most popular video site and the eight most popular overall (hitwise.com).

<sup>17</sup> A blog that covers YouTube and similar sites lists a range of active suits (including class actions) against YouTube including the high-profile Viacom case (*Viacom v YouTube*, 07-CV-01203, Southern District NY): <http://www.theutubeblog.com>.

<sup>18</sup> For example, the ‘Attention’ matrix compiled by Compete points to the high amount of time spent by users on video and social networking websites: <http://blog.compete.com/2007/07/11/compete-attention-200-june/>; see also Spire (n 3).

these videos) takes place every day – through the application of general law (in particular copyright law)<sup>19</sup> and through the terms of use of the site:

YouTube reserves the right to decide whether Content or a User Submission is appropriate and complies with these Terms of Service for violations other than copyright infringement and violations of intellectual property law, such as, but not limited to, pornography, obscene or defamatory material, or excessive length. YouTube may remove such User Submissions and/or terminate a User's access for uploading such material in violation of these Terms of Service at any time, without prior notice and at its sole discretion.<sup>20</sup>

Sometimes, of course, the private regulator (which continues, through its public policy advocacy, to express opposition to 'regulation')<sup>21</sup> goes too far, and an outcry forces a reversal. Indeed, some situations seem to be perfect illustrations of the problem; take for example the controversial removal (on multiple occasions, on grounds of copyright law) of a video that contained information on an allegedly overreaching copyright claim by the National Football League (NFL), posted on YouTube by law professor (and former Electronic Frontier Foundation (EFF) attorney) Wendy Seltzer.<sup>22</sup> In other situations, the outcry (from 'the public' or from state authorities) is directed towards Google and YouTube, resulting in a takedown of material on the global site based on objections in non-US jurisdictions, as in the case of recent pro-Nazi materials.<sup>23</sup>

A major source of embarrassment for various parties asserting copyright violations (and indeed for YouTube) are the proceedings brought by the EFF in relation to apparently erroneous takedown notices related to the Viacom litigation and other matter.<sup>24</sup> In this regard, the promised development of

<sup>19</sup> See discussion of the Digital Millennium Copyright Act (DMCA), below.

<sup>20</sup> <http://www.youtube.com/t/terms>, section 7B.

<sup>21</sup> 'If we need to, we will step up our advocacy efforts to make sure that politicians and regulators don't impose unnecessary regulations which would stifle the fantastic growth of user-generated content.' P Moll, 'European content regulation and the Audiovisual Media Services Directive' (Google Public Policy Blog, 16 July 2007), <http://googlepublicpolicy.blogspot.com/2007/07/european-content-regulation-and.html>. The author is Google's European Policy Manager.

<sup>22</sup> A summary of events is posted on Seltzer's blog: 'NFL: Second Down and Goal?' 5 April 2007, [http://wendy.seltzer.org/blog/archives/2007/04/05/nfl\\_second\\_down\\_and\\_goal.html](http://wendy.seltzer.org/blog/archives/2007/04/05/nfl_second_down_and_goal.html).

<sup>23</sup> P Donahue, 'Google Plans to Remove Nazi Hate Videos on YouTube in Germany' (*Bloomberg News* 28 August 2007), <http://www.bloomberg.com/apps/news?pid=20601100&sid=aZt3njiVsNqo>. Despite the headline, the removal relates to the general, global YouTube site. The YouTube terms of service still assert that 'i) the YouTube Website shall be deemed solely based in California; and (ii) the YouTube Website shall be deemed a passive website that does not give rise to personal jurisdiction over YouTube, either specific or general, in jurisdictions other than California.' (The term 'passive website that does not give rise to personal jurisdiction' is a clear echo of the *Zipco* test (*Zipco Manufacturing v Zipco.com* (1997) 952 F Supp 1119 (Western District PA)).

<sup>24</sup> For example, *Saipent v Geller* ([http://www.eff.org/legal/cases/saipent\\_v\\_geller/](http://www.eff.org/legal/cases/saipent_v_geller/)), the 'Electric Slide' litigation (<http://www.eff.org/legal/cases/electricslide/>) *Diehl v Crook* ([http://www.eff.org/legal/cases/diehl\\_v\\_crook/](http://www.eff.org/legal/cases/diehl_v_crook/)) and a suit against Viacom in relation to an error in a large set of takedown notices (<http://www.eff.org/deeplinks/archives/005213.php>). All of these matters have been settled with apologies or are still in progress.

automatic copyright violation-detecting technologies is cause for concern.<sup>25</sup> Aside from familiar concerns about the automation of legal systems, the fact that the most important factor that seems to come into play for controlling access to user-generated video content is not legislation or regulations but YouTube's policies service at least indicates that the current measure of 'control' may be in private, unaccountable hands (which some believe to be trigger-happy) and should be challenged, rather than reinforced through automated processes.

The role of legislation (and legal culture) in bringing about this situation cannot be ignored, though. For example, the notice-and-takedown requirements of section 512 of the (US) Copyright Act (popularly the Digital Millennium Copyright Act 'safe harbor' provisions), which grants some liability to the online service provider against copyright claims if they follow certain conditions (including disabling access to the allegedly infringing material, on receipt of proper notice from the rights owner, and communicating with the user who uploaded it (but not necessarily before disabling access)), with a more difficult system for users to apply to have the material reinstated,<sup>26</sup> clearly favours and encourages the 'delete now, ask questions later' approach taken by YouTube and other Web 2.0 hosts. On the other hand, the requirements of section 230 of the Telecommunications Act (inserted as part of the Communications Decency Act and passed as part of the 1996 telecommunications law reform) are less onerous<sup>27</sup> - although many providers remain unwilling or unable to use section 230 or similar provisions.<sup>28</sup> The value of section 230 has been debated at length<sup>29</sup> and continues to lead to interesting cases,<sup>30</sup> but of course it remains silent on the rights of non-intermediaries.<sup>31</sup>

The focus of new legislation and international agreements on the enhancement of the protection of intellectual property (rather than on user rights) and the creeping reduction in what is considered as fair use or fair dealing (with the honourable exception of the Supreme Court of Canada in *CCH Canadian v Law*

<sup>25</sup> See for example the comments of Google attorney Philip Beck, reported in C Metz, 'YouTube video-fingerprinting due in September' (*The Register* 30 July 2007), [http://www.theregister.co.uk/2007/07/30/youtube\\_video\\_fingerprinting\\_due\\_in\\_fall/](http://www.theregister.co.uk/2007/07/30/youtube_video_fingerprinting_due_in_fall/).

<sup>26</sup> US Code, Title 17 Chapter 5, §512c.

<sup>27</sup> US Code, Title 47, Chapter 5(II), §230c. This section does not apply to federal criminal law and intellectual property law.

<sup>28</sup> Hedley argues (at 154) that many providers show 'timidity' in dealing with legal threats: S Hedley, *The law of electronic commerce in the UK and Ireland* (London: Cavendish, 2005).

<sup>29</sup> K Myers, 'Wikimmunity: Fitting The Communications Decency Act to Wikipedia' 20 Harvard Journal of Law and Technology 163 (arguing that Wikipedia should not be protected by section 230); Holland, 'In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism' (2007) 56 Kansas L Rev 101 (paying tribute to the role of section 230 thus far); M Lemley, 'Rationalizing Internet Safe Harbors' (SSRN), <http://ssrn.com/abstract=979836> (favouring some reform of the provision).

<sup>30</sup> Most recently, in *Fair Housing Council v Roommate.com*, the *en banc* Ninth Circuit Court of Appeal (3<sup>rd</sup> April 2008) found that certain aspects of a website providing accommodating listings could not be the subject of litigation (under equality law) while others could.

<sup>31</sup> Even after the decision in *Barrett v Rosenthal* (2006 WL 3346218 (SC Ca., 20 November 2006)) (a user can rely on section 230 with regard to republishing the words of others), the 'rights' of a user as expressed against their hosts are not protected, in terms of their own expression – and section 230 enables intermediaries to censor user speech without review while freed from the threat of editorial or publisher liability.

*Society*<sup>32</sup> and *SOCAN v CAIP*<sup>33</sup>) hardly encourages sensible corporations to take a hands-off approach. The deception is thus complete: the legislators can swear that they are not regulating 'the Internet', merely modernising and deepening important (and pro-business?) intellectual property laws, while YouTube and similar enterprises, as long as they continue to follow the instructions set down in copyright and other general legislation, can regulate away without the need to deal with conventional democratic structures or engage in freedom of expression analysis (or even the balancing aspects – or what remains of them – of intellectual property law). The problem is that copyright law and even other statutory regimes such as data protection<sup>34</sup> and private terms of service are sources of regulation that affect the producer of user-generated content and thus their ability to participate in public debate and to exercise freedom of expression.

In that context, a particular point of concern is the restriction of political speech on social networks favoured by younger users. Allegations have been made against Myspace,<sup>35</sup> Bebo,<sup>36</sup> Flickr<sup>37</sup> and Facebook<sup>38</sup>. Publishers like AT&T (in

<sup>32</sup> [2004] SCC 13 (holding that certain activities of the Law Society's library did not infringe Canadian copyright law, giving a broad interpretation to the fair dealing provisions of the Copyright Act)

<sup>33</sup> [2004] SCC 45 (holding in favour of ISPs in proceedings over liability for the download of music by users, caching by ISPs and other matters).

<sup>34</sup> A recent example is the threatened use of the Data Protection Act to secure the removal of a 'hidden camera' video published as part of a dispute between a client and social workers. 'No data protection exemption for YouTube baby battle video' (*The Register* 22 August 2007), [http://www.theregister.co.uk/2007/08/22/baby\\_battle\\_dpa\\_exemption/](http://www.theregister.co.uk/2007/08/22/baby_battle_dpa_exemption/). It is believed that the arguments are based on the *Lindqvist* case ([2003] ECR I-12971), which allowed data protection law to be applied to the posting of (what could be described as trivial) personal data on the Internet.

<sup>35</sup> See for example a summary of the arguments between liberal advocacy group Moveon.org and MySpace: 'MoveOn Openly Battling MySpace Censorship' (18 May 2007), <http://mashable.com/2007/05/18/moveon-myspace/>; J Bosman, 'Lesson for Murdoch: Keep the Bloggers Happy' (*New York Times* 2 January 2006); C Harold, *Ourspace: resisting the corporate control of culture* (Minneapolis: U of Minnesota Press, 2007) xv; See e.g. B Pesta, 'MySpace: No place for Atheists?', <http://www.secularstudents.org/node/1933>, 'MySpace Atheist and Agnostic Group Restored (sort of)', <http://www.secularstudents.org/node/1942>, 'Banned: MySpace deletes world's largest atheist group', <http://blog.newhumanist.org.uk/2008/01/banned-myspace-deletes-largest-atheist.html>

<sup>36</sup> See for example the discussion by Gareth Stack and Simon McGarr: G Stack, 'Bebogate?' (15 March 2007), <http://www.dbspin.com/social-networks/bebogate/> and 'Webcamp – social networks' (10 March 2007), <http://www.dbspin.com/web/webcamp-social-networks/>. A range of Irish political campaigns, including the left-wing Killer Coke activist network and republican political party Sinn Féin's youth wing, have alleged that Bebo has censored/deleted user profiles.

<sup>37</sup> 'Yahoo "censored" Flickr comments' (*BBC News* 18 May 2007), <http://news.bbc.co.uk/1/hi/technology/6665723.stm> (deletion of critical comments); J Libbenga, 'German Flickr censorship causes web outcry' (*The Register* 18 June 2007), [http://www.theregister.co.uk/2007/06/18/outcry\\_against\\_flickr\\_censorship/](http://www.theregister.co.uk/2007/06/18/outcry_against_flickr_censorship/) (State-based filtering).

<sup>38</sup> L Beyerstein, 'Facebook Bans Union Organizer for Making Too Many Friends' (*Altnet* 24 January 2008), <http://www.altnet.org/blogs/peek/74855/> and T Connell, 'Banned Union Organizer Back on Facebook' (*AFL-CIO Blog* 25 January 2008), <http://blog.aflcio.org/2008/01/25/banned-union-organizer-back-on-facebook/> (trade union organisation); 'Tech Notebook' (*San Jose Mercury News* 23 February 2008), [http://www.mercurynews.com/ci\\_8344164](http://www.mercurynews.com/ci_8344164) (political campaigning); J Pena-Bickley, 'My Facebook Fiasco' (*ON: Digital + Marketing* 13 February 2008),



its capacity as a host/sponsor rather than ISP) routinely censor political comments<sup>39</sup>. Systems of censorship in jurisdictions with restrictive policies on political expression have begun to target social networking and web 2.0 site hosts on a regular basis.<sup>40</sup> Calls have been made for further analysis of the various Web 2.0 services, including Dan McQuillan's persuasive argument for treating site policies on freedom of expression like privacy policies, exposing them to similar scrutiny and analysis.<sup>41</sup> A detailed guide on how to respond 'when Facebook censors your political speech' is available<sup>42</sup> and some users have tried to list the (apparently arbitrary) reasons why accounts can be disabled.<sup>43</sup> Indeed, the power of a service provider to close an account is a particularly important one.<sup>44</sup>

Of course, there is no obligation on anyone to set up a Myspace or Bebo profile. However, going beyond the formal legal position, and drawing on the tradition of public forum analysis in US law, it is clear that, especially within schools, social groups and personal relationships, these sites are of particular importance in the production of culture and meaning. A situation where the political expression (of young speakers or others) is subject to the veto of unaccountable site owners (in the sense that they lack transparent, public, legal mechanisms for the review of their actions) is a real challenge to the more idealistic visions of new forms of media and the consequence of such for freedom of expression.<sup>45</sup> These hosts sometimes show little hesitation in controlling expression, including high-value political expression, relying upon their privileged position as private publishers while making public assertions about communication and connecting communities. Indeed, the general point that citizens have increasingly few opportunities to engage with each other through what in the US are (for legal purposes) traditional public forums<sup>46</sup>, to this author, adds to the relevance of political expression (and the enormity of censorship) on 'youth'-targeted social networking sites.

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<http://joannapenabickley.typepad.com/on/2008/02/on-my-facebook.html> (unobjectionable political content deleted after misuse of 'report post' function).

<sup>39</sup> G Kaufman, 'AT&T Admits It Edited Webcasts Before Pearl Jam's' (*MTV News* 13 August 2007), [http://www.mtv.com/news/articles/1566946/20070813/pearl\\_jam.jhtml](http://www.mtv.com/news/articles/1566946/20070813/pearl_jam.jhtml).

<sup>40</sup> Significant work on this topic has been carried out by Ethan Zuckerman: see for example R Singel, 'Seeking Tighter Censorship, Repressive States Target Web 2.0 Apps' (*Wired Blogs : Epicenter* 4 March 2008) <http://blog.wired.com/business/2008/03/etech-what-happ.html>

<sup>41</sup> D McQuillan, 'We need a freedom of expression league table for Web 2.0' (July 2007), [http://www.internetartizans.co.uk/a\\_freedom\\_of\\_expression\\_league\\_table\\_for\\_web\\_2\\_0\\_space](http://www.internetartizans.co.uk/a_freedom_of_expression_league_table_for_web_2_0_space)

<sup>42</sup> [http://howto.wired.com/wiki/Respond\\_when\\_Facebook\\_censors\\_your\\_political\\_speech](http://howto.wired.com/wiki/Respond_when_Facebook_censors_your_political_speech)

<sup>43</sup> T Muller, '13 Reasons your Facebook account will be disabled' November 2007, [http://getsatisfaction.com/facebook/topics/13\\_reasons\\_your\\_facebook\\_account\\_will\\_be\\_disabled](http://getsatisfaction.com/facebook/topics/13_reasons_your_facebook_account_will_be_disabled)

<sup>44</sup> G Kwek, 'Facebook giveth, Facebook taketh away' (*Sydney Morning Herald* 29 October 2007), <http://www.smh.com.au/news/web/facebook-giveth-facebook-taketh-away/2007/10/29/119355573838.html>, D Solove, 'Facebook Banishment and Due Process' (*Concurring Opinions* 3 March 2008), [http://www.concurringopinions.com/archives/2008/03/facebook\\_banish.html](http://www.concurringopinions.com/archives/2008/03/facebook_banish.html)

<sup>45</sup> Zittrain argues that many of the new services based on collaboration are, architecturally, capable of being controlled, even though their current methods of operation may differ. J Zittrain, 'Saving The Internet' (*Harvard Business Review* June 2007).

<sup>46</sup> See for example K O'Neill, 'Privatizing Public Forums To Eliminate Dissent' (2006/7) 5 First Amendment L Rev 201, 203, 211.

Our faith in new media and our belief in the value of user-generated content has the potential to upset the balance between freedom and control, as the ability of the stronger parties (what I call the 'New Gatekeepers') to massage Internet law is enhanced (through a blend of law, technology and culture) in a way that can go beyond normal consumer relations, given both the enhanced engagement of the end user (as a producer rather than passive recipient) and the hostility of Internet industries to any form of legal protection for users.

### 3. The Mess Age: How The Crowd Can Get Wise

- a. User Indignation (Or, 09-f9-11-02-9d-74-e3-5b-d8-41-56-c5-63-56-88-c0)<sup>47</sup>

Protecting the encryption of DVDs has bothered manufacturers for some time. Cracking said encryption is one of the favourite pastimes of certain programmers. It was inevitable, then, that the string above, which is used in encryption of the HD-DVD format, would be published and distributed. Among the reasons for its fame, though, is the 'user revolt' that it provoked on 'user-submitted' news site digg.com.

Digg users submitted posts about the string, after a range of sites had received takedown notices from the industry consortium responsible for the format. These posts were quickly deleted by editors. They tried again and, through the ranking systems of the site, the profile of the stories and the string increased. The stories were deleted again. More stories appeared. More deletions happened (while, in the meantime, similar issues were cropping up on other sites, and the string was being reproduced on everything from Wikipedia pages to t-shirts). The saga came to an end with a dramatic post by editor and founder Kevin Rose, the title of which was 'Digg This' followed by the full string.<sup>48</sup> In this post, Rose acceded to the will of the community and allowed the posting of the string to continue; 'If we lose, then what the hell, at least we died trying'.<sup>49</sup>

On communities and control, Murray referred to the infamous sales of Live 8 tickets on eBay.<sup>50</sup> The sale of these limited, free tickets on the site sparked some anger within the 'eBay community', with a mixture of tactics being employed. These tactics included direct action (false bidding, disruption, etc by a small group of activists) and more conventional expressions of dissent (such as complaints on message boards) taken by a wider group of users). eBay backed down and adopted a new policy of forbidding the sale of these particular tickets. Murray argues, though, that the eBay decision was due to the actions of the broad eBay community (and not concert organiser Bob Geldof, the media or even those who engaged in direct action) – perhaps a difficult assertion to

<sup>47</sup> C Jeffrey, 'In Digg Nation', *Mother Jones* (July/August 2007), [http://www.motherjones.com/interview/2007/07/kevin\\_rose.html](http://www.motherjones.com/interview/2007/07/kevin_rose.html)

<sup>48</sup> K Rose, 'Digg This: 09-f9-11-02-9d-74-e3-5b-d8-41-56-c5-63-56-88-c0' (1 May 2007), <http://blog.digg.com/?p=74>.

<sup>49</sup> Ibid.

<sup>50</sup> A Murray, *The Regulation of Cyberspace* (Abingdon: Routledge, 2007), 154-7.

prove, as assigning motives to the decision of a company is far from an exact art (even when the official reason is 'community' pressure) but is indeed a strong argument against accepting that the New Gatekeepers have total freedom of action.

Of course, a collection of letters and numbers of interest to an engineer or a listing of concert tickets may not be typical examples of user-generated content, but they do illustrate one model of relationship between the user community and site editors in a Web 2.0 environment, and in particular the danger (to IP owners) of taking on 'the community'. These 'Spartacus moments'<sup>51</sup> are not uncommon on the Internet. They add to John Gilmour's famous observation (that the Internet treats censorship as damage and routes around it)<sup>52</sup> a gloss that the Internet community (or, more realistically, a subculture of Internet users) treats censorship as a threat and routes around it through reproducing the threatened content many times.

In the case of media, copyright and censorship, the interaction between the actions of gatekeepers and the response of the community continues to be an important one, as law firm Nixon Peabody found out to their cost recently.<sup>53</sup> Clearly these actions draw upon both the culture of early Internet users<sup>54</sup> and consumer pressure campaigns more generally. Furthermore, in many of the allegations of censorship summarised in this paper, users participated in electronic civil disobedience or lobbying against decisions perceived to be arbitrary or unfair.

It can be noted, though, that this may have limitations as a tactic, particularly in an environment where the number of persons connected continues to rise and the number of interactions between those who exercise powers of control and the user rises too. For the amateur creator, unversed in Internet subcultures, the protection of angry Diggers may offer little consolation. Indeed, a particularly negative interpretation is that the culture of protecting free speech itself may itself be modified or softened through the influence of new users.

#### b. Legal balancing

Existing laws, particularly those related to consumer protection, may assist the new generation of users. For example, the Computer and Communications Industry Association (CCIA) has brought an application before the Federal Trade Commission in the US to challenge some of the what they see as the more egregious examples of abuse of intellectual property power, citing the NFL, Major League Baseball, Penguin Books and others as engaging in illegal

<sup>51</sup> [http://en.wikipedia.org/wiki/Spartacus\\_\(film\)#l.27m\\_Spartacus.21](http://en.wikipedia.org/wiki/Spartacus_(film)#l.27m_Spartacus.21)

<sup>52</sup> P Elmer-DeWitt, 'First Nation in Cyberspace' (*Time* 6 December 1993).

<sup>53</sup> An entertaining and recent example is that of the law firm Nixon Peabody, whose attempts to have a leaked video removed from YouTube resulted in ridicule, further dissemination and that most old-media of fates, an article in the New York Times (M de la Merced, 'Unauthorized Enjoyment of Song Irks Law Firm' (*New York Times* 27 August 2007)).

<sup>54</sup> This is well-documented; for example, Biegel highlights 'libertarian' approaches to free speech and the defence of the right to speak anonymously; S Biegel, *Beyond Our Control? : confronting the limits of our legal system in the age of cyberspace* (Cambridge, MA: MIT Press, 2001), 21-2

behaviour (deceptive trade practices and unfair trade practices) through copyright warnings that allegedly misrepresent the state of the law and in particular user rights such as fair use.<sup>55</sup> Law professors Ariel Katz and Michael Geist have wondered whether similar action should be taken against Canadian licensing agency Access Copyright.<sup>56</sup>

In some areas of intellectual property law, the making of 'groundless threats' can be grounds for further legal action.<sup>57</sup> For example, certain regulations (indigenous and transposing) in the UK relating to designs, trademarks and patents provide for remedies.<sup>58</sup> Bainbridge has highlighted the inconsistency in certain abusive practices being subject to straightforward punishment and others not being so treated, even though some areas such as copyright (where no such remedy exists)<sup>59</sup> are experiencing more instances of groundless threats than those covered under existing legislation.

Of course, it is accepted that normal competition law remedies may be available to constrain IP abuses. It must be noted, though, that if the restraint of groundless threats or overzealous enforcement were a serious demand, it would join a long list of 'user rights' demands (such as ceasing the ceaseless extension of copyright terms, allowing the unlocking of digital rights management (DRM), protecting parody, defending time-shifting and space-shifting, etc), and thus may be an unrealistic proposal in political terms.

Furthermore, concerns over standard-form contracts and electronic transactions have come to the forefront in a number of recent cases, such as *Dell v Union des Consommateurs*<sup>60</sup> (Canada) and *Shroyer v New Cingular & AT&T*<sup>61</sup> (US). End-user licence agreements (EULAs) have been studied and criticised by consumer authorities.<sup>62</sup> In the context of the discussion of contract law, these certainly contribute to a debate about power and control in the electronic era; however, contract law may not resolve all these problems, as its tools are not necessarily appropriate or geared towards questions of speech and culture.

Although not appearing in the text of the treaties, the doctrine of 'essential facilities' (usually discussed in the context of Article 86) is an important one

<sup>55</sup> Complaint filed with the FTC, 1 August 2007: <http://www.ftc.gov/os/070801CCIA.pdf>.

<sup>56</sup> A Katz, 'Access Copyright and Misleading Copyright Notices' (University of Toronto Faculty Blog, 3 August 2007), [http://utorontolaw.typepad.com/faculty\\_blog/2007/08/access-copyright.html](http://utorontolaw.typepad.com/faculty_blog/2007/08/access-copyright.html); M Geist, 'Copyright Notices' (14 November 2006), <http://www.michaelgeist.ca/content/view/1530/125/>.

<sup>57</sup> D Bainbridge, 'Groundless Threats and the Internet' (2007) 23 Computer Law and Security Report 282.

<sup>58</sup> See e.g. the Community Design Regulations 2005 (SI 2339/05) s 2.

<sup>59</sup> The US DMCA does provide some protection, with the EFF cases discussed above relying upon these provisions. There is no parallel in British law, though, which is Bainbridge's argument.

<sup>60</sup> [2007] SCC 34 (holding that an arbitration clause in an electronic contract (the details being accessible via a hyperlink) was enforceable).

<sup>61</sup> No. 06-55964 (9<sup>th</sup> Circuit CA, 17 August 2007) (holding that an arbitration clause in an electronic contract (agreed by telephone) was unconscionable and not enforceable)

<sup>62</sup> National Consumer Council, 'Whose license is it anyway?', [http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr\\_whose\\_licence.pdf](http://www.ncc.org.uk/nccpdf/poldocs/NCC195rr_whose_licence.pdf).

within EU competition law.<sup>63</sup> Of initial relevance in transport (where ferry operators were using their ownership of ports in a way that disadvantaged rival operators) and then in telecommunications, it has already been recognised that 'convergence creates bottlenecks with a highly strategic commercial value'<sup>64</sup>. Historically, similar principles have been applied to newswires in the US,<sup>65</sup> were considered in an European Court of Justice case regarding newspaper distribution,<sup>66</sup> and in the Internet and new media areas, EU legislation on conditional access (for pay television) and interconnection (for networking) have seen the application of essential facilities arguments.<sup>67</sup> Could these ideas be of use in the area of user-generated content, preventing site operators from squeezing out others?<sup>68</sup> However, the intellectual link between the essential facilities doctrine and economic monopolisation is difficult to break, and the precedents at EU level have related to more things that are arguably more important (in the context of the European Union's role in economic integration) than the right to post about politics on a Bebo page.

### c. Corporate Social Responsibility

Can we rely on the important players, then, to use their power over users in a responsible fashion? Corporate social responsibility is an idea that is easy to grasp: that corporate legal persons have a duty to act in a way that is sustainable, or respectful of human rights, or sensitive to race and gender, or to take other actions that go beyond the normal requirements of commercial practice. In a world where the publication of user-generated content depends so much on the facilities provided by private companies (in the same way that corporations wield influence in other areas), is it not useful for those concerned about the future of user-generated content to look to companies and their corporate social responsibility policies for solutions?

Although initial suggestions have been made about corporate social responsibility and Internet filtering (i.e. the more overt censorship practiced in certain countries), this remains a relatively underdiscussed area. A very useful taxonomy of those companies that might face requests or orders to engage in filtering shows that effectively all aspects of the Internet industry are potentially implicated in international censorship and that understanding the ethical dilemmas is thus of some importance.<sup>69</sup> Given the infamous decision by

<sup>63</sup> See generally J Temple Lang, 'The Principle of Essential Facilities and its Consequences in European Community Competition Law' in *Essays In Regulation* (no 7) (Regulatory Policy Institute, 1996); A Bavasso, 'Essential Facilities in EC Law: The Rise of an "Epithet" and the Consolidation of a Doctrine in the Communications Sector' (2002) 21 Ybk of Eur L 63; R Pitofsky, D Patterson & J Hooks, 'The Essential Facilities Doctrine Under United States Antitrust Law' (2002) 70 Antitrust LJ 443.

<sup>64</sup> Bavasso (n 63).

<sup>65</sup> *Associated Press v US* (1945) 326 US 1.

<sup>66</sup> *Bronner v Mediaprint* [1998] ECR I-7791

<sup>67</sup> N Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (The Hague: Kluwer, 2005).

<sup>68</sup> A related argument is Zittrain's call for 'network neutrality for mashups'. Zittrain (2007) (n 45).

<sup>69</sup> J Palfrey and J Zittrain, 'Reluctant Gatekeepers: Corporate Ethics on a Filtered Internet' in R Deibert et al (eds), *Access Denied : the practice and policy of global internet filtering* (in particular 110-113). See also a summary by the same authors at J Palfrey and J Zittrain, 'Companies need guidance to face censors abroad' (*CNET News* 14 August 2007),

Google to back down on its no-filtering promise in order to gain access to the Chinese market, it is understandable that an advocate of free expression might doubt the bona fides of the seemingly friendly New Gatekeepers, headquartered in Silicon Valley rather than Wall Street. The rejection of moderate proposals on freedom of expression proposed by pension funds at the Google and Yahoo AGMs<sup>70</sup> (such rejection being recommended by the boards of the respective corporations) only adds to this scepticism. Furthermore, the arguments that support corporate social responsibility in the traditional regulated media and communications industries may not be as apparent in Internet industries.<sup>71</sup> MacKinnon's analysis of corporate social responsibility and US companies operating in China identifies the difficulties presented by the requirement to comply with domestic law and how it differs from US or international law in a particular area, and the role that users can play in demanding full disclosure and honesty from Web industries above and beyond mere compliance with the law.<sup>72</sup> However, while corporate social responsibility remains controversial and not fully tested, this approach – perhaps fused with the consumer-activist approach discussed above – may act as a check on complete freedom for corporate owners.

#### d. Self-regulation?

Methods of co-regulation and self-regulation have proliferated in recent years, as have co-regulatory strategies (regulation by an industry with the approval of legal authorities) and optional schemes run by public authorities. The US state of Utah is considering a voluntary 'seal of approval' system for ISPs.<sup>73</sup> In the UK, the Broadband Strategy Group (a joint Government-industry group) has established what it calls Audiovisual Content Information Good Practice Principles<sup>74</sup> agreed by many UK media producers (traditional broadcasters with online elements such as Channel 4, intermediaries such as mobile phone

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[http://news.com.com/Companies+need+guidance+to+face+censors+abroad/2010-1028\\_3-6202426.html](http://news.com.com/Companies+need+guidance+to+face+censors+abroad/2010-1028_3-6202426.html). Regarding ongoing collaboration between Internet companies to develop external standards, see B Baue, 'From Competition to Cooperation: Companies Collaborate on Social and Environmental Issues' (*Social Funds* 19 January 2007), <http://www.socialfunds.com/news/article.cgi/2208.html>.

<sup>70</sup> M Helft, 'Dissident Shareholders Send Message to Yahoo' (*New York Times* 13 June 2007); J Oates, 'Institutional Investors Push Google On China' (*The Register* 1 May 2007), [http://www.theregister.co.uk/2007/05/01/google\\_investor\\_action/](http://www.theregister.co.uk/2007/05/01/google_investor_action/). It is likely that the proposal of similar resolutions in 2008 will not be successful: M Zimmer, 'Google (again) Opposes Anti-Censorship and Human Rights Proposals', (*Michaelzimmer.org* 36 March 2008), <http://michaelzimmer.org/2008/03/26/google-again-opposes-anti-censorship-and-human-rights-proposals/>.

<sup>71</sup> Typically, the theoretical attractions of corporate social responsibility in media and communications relates to spectrum and licensing – see for example the comments of Simon Cooper of GWR (UK radio) at a Westminster Media Forum conference (2004) on 'Corporate Social Responsibility and the Media': 'Broadcasters all have a written license to operate granted by Ofcom. We also have an unwritten license to operate granted by society – a license that is, paradoxically, more fragile and easier to lose than the Ofcom one' (he continues to justify this attitude through reference to spectrum scarcity).

<sup>72</sup> R MacKinnon, 'Shi Tao, Yahoo!, and the lessons for corporate social responsibility' (working paper, December 2007, available at <http://rconversation.blogs.com/YahooShiTaoLessons.pdf>)

<sup>73</sup> J Robinson, 'House Bill Would Create Voluntary Seal of Approval for Internet Service Providers' (*KCPW News* 25 February 2008), <http://www.kcpw.org/article/5422>

<sup>74</sup> <http://www.audiovisualcontent.org/audiovisualcontent.pdf>

networks and hosts such as Bebo). Voluntary systems in the EU include 'DNS blacklisting' (or poisoning), filtering and more;<sup>75</sup> none are (as yet) backed by legislation and the requirements of the Electronic Commerce Directive are unclear in this regard. In some cases, national governments have played a significant role in the drafting of such codes, even writing the first draft in the case of Italy.<sup>76</sup>

However, does an over-emphasis on non-interventionist techniques enable intermediaries to possess unintentionally significant power in violation of the communicative rights of individual users? They are perceived as efficient in the context of Internet regulation,<sup>77</sup> although certainly, some scepticism has been expressed regarding the impact of self-regulation on freedom of expression. In particular, the concern of 'the privatisation of censorship' is a common one, with particular emphasis being placed on the lack of accountability mechanisms.<sup>78</sup> The EU, though, is a vigorous promoter of self-regulation and co-regulation in the context of media law.<sup>79</sup> The Council of Europe has also showed some interest in this topic, in its 'Recommendation on freedom of expression in the online world' which relies in part on the proposal of self-regulatory solutions. EDRI, the network of digital rights NGOs in Europe, has launched a campaign against this Recommendation, arguing that the document 'promot(es) opaque "self-regulation" and other soft law instruments driven by private interests and implemented through technical mechanisms.'<sup>80</sup> Justification for this concern can be seen from the record of the first major example of online co-regulation, dispute resolution for domain names, where systematic unfairness has been identified by both Mueller<sup>81</sup> and Geist<sup>82</sup> in separate research projects. Legal control remains unclear and differs greatly even within the common-law world, changing rapidly in the light of the Human Rights Act in the UK.<sup>83</sup>

#### 4. The Message

'The modern Internet is at a point of inflection.'<sup>84</sup>

<sup>75</sup> See a list at <http://libertus.net/censor/ispfiltering-gl.html>; see also Tambini et al (n 15).

<sup>76</sup> Tambini et al (n 15) 114.

<sup>77</sup> Murray (n 50).

<sup>78</sup> H Thorgerisdottir, 'Self-censorship among journalists: a (moral) wrong or a violation of ECHR law?' (2004) 4 European Human Rights L Rev 383, 391.

<sup>79</sup> See for example Directive 2007/65/EC ('Audiovisual Media Services Directive'), recital 36.

<sup>80</sup> <http://www.edri.org/coerec200711>.

<sup>81</sup> M Mueller, 'Rough Justice: An Analysis of ICANN's Uniform Dispute Resolution Policy', [www.acm.org/usacm/IG/roughjustice.pdf](http://www.acm.org/usacm/IG/roughjustice.pdf)

<sup>82</sup> M Geist, 'Fair.com? An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP', <http://aix1.uottawa.ca/~geist/geistudrp.pdf>

<sup>83</sup> A particular question is whether decisions taken by self-regulatory authorities are reviewable in public law: see generally Tambini et al (n 15) 278-281. The Advertising Standards Authority in the UK is (*R v ASA ex parte Insurance Services* (1990) 2 Admin LR 77); furthermore, as a matter of Irish constitutional law and its acceptance of direct horizontal effect in the context of breaches of fundamental rights by private parties (see C O'Cinneide, 'Direct Horizontal Effect – A Successful Experiment?' in J Fedtke (ed), *Human rights and the private sphere: a comparative study* (London: Routledge-Cavendish, 2007), such conduct could be justiciable under certain circumstances (although the limited scope of freedom of expression under Irish law may prevent this from happening in practice).

<sup>84</sup> Zittrain (2006) (n 9)

Jonathan Zittrain argues that the 'generativity' of the grid made up of the Internet and the various computers connected to it is threatened not just by malign actions (virus writers, spam, etc) but also by the systems develop to meet security and safety concerns ('tethered' appliances and locked-down applications).<sup>85</sup> It is an unavoidable starting point for any general consideration of future Internet regulation. How do we heed his call to consider change, though? Is 'regulation' necessary after all?

Even traditional rights-based protections of free expression such as the First Amendment itself can be seen as a form of legal regulation of speech, in that it forms part of the law that affects how speech is treated by the (US) state, constrains the actions of state actors where speech is concerned and contributes to the formation of a particular legal culture. More controversially, the idea of a right of access to media,<sup>86</sup> opposition to the 'monopolisation of knowledge'<sup>87</sup> and of substantive 'freedom of communication'<sup>88</sup> are potentially useful. Moving the debate from the sterile territory of regulation vs no regulation to an honest consideration of the value of freedom of expression in the context of other laws and rights may be most helpful, particularly in a context where new media actors are brought within the scope of existing laws that favour news reporting or cultural expression (such as the protection of sources and fair use for the purposes of parody).

The publication of user-generated content is increasingly seen as part of a market. Naturally, arguments over competition and free enterprise can be significant in any discussion of how to control the message of Internet law. Even for those that rejoice in unregulated markets, though, the success of the European Union in opening up competitive markets in telecommunications can be recognised as a successful approach – that involved both regulation *and* the enhancement of competition – with arguably beneficial consequences for expression and culture, most notably through a diversification and fragmentation of gatekeepers, thus lessening the power of older monopolies (state and private). Furthermore, the EU approach is constrained by the commitment to the protection of cultural diversity contained within the institution's treaties<sup>89</sup> and the application of cultural considerations within

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<sup>85</sup> J Zittrain, *The Future of the Internet – And How To Stop It* (London: Allen Lane, 2008).

<sup>86</sup> See recently P Napoli & S Syblis, 'Access to Audiences as a First Amendment Right: Its Relevance and Implications for Electronic Media Policy' (2007) 12 Virginia J of L & Tech 1 and (for ISPs and search engines) J Chandler, 'A right to reach an audience : an approach to intermediary bias on the Internet' (2007) 35 Hofstra L Rev 1095, 1117-8.

<sup>87</sup> The present author has discussed the relationship between this concept (particularly influential in Canadian communications theory) and new media law in more detail in 'Minerva's Mouse : The Challenge of Cyberlaw' (paper presented to the Graduate Law Students' Association Conference 2007, Osgoode Hall, available at [http://www.osgoode.yorku.ca/glsa/2007conference/2007\\_schedule.html](http://www.osgoode.yorku.ca/glsa/2007conference/2007_schedule.html))

<sup>88</sup> For a good summary of communication rights and the Internet, see W McIver, W Birdsall & M Rasmussen, 'The Internet and the right to communicate' (2003) 8(12) First Monday, [http://www.firstmonday.org/issues/issue8\\_12/mciver/](http://www.firstmonday.org/issues/issue8_12/mciver/). For an influential discussion of the First Amendment, media regulation and the Internet, see J Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 New York University L Rev 1.

<sup>89</sup> Article 151 EC; see generally R Craufurd Smith, *Culture and European Union Law* (Oxford: OUP, 2004).



competition or other aspects of European law is continuing to be an important issue for media and communications, particularly in the light of the UNESCO Convention on Cultural Diversity which entered into force in March 2007.<sup>90</sup>

Taking all these points together, my conclusion is that the consideration of the message of Internet law cannot go forward without addressing the problem of the private gatekeeper. The New Gatekeepers wield huge control, both in theory and in practice. Indeed, I would go so far as to say that they can stifle generativity, and may act as a force towards culture and expression in a way that tethered appliances do towards the generative 'grid'. In this, I differ from Andrew Keen, who argues in a recent book that the universe of user-generated content is 'destroying our culture'.<sup>91</sup> While he expresses some valid points about the social role played by editors and broadcasters in the past, I assert that it is in fact possible to welcome the diversity of new media without accepting without question the role of the New Gatekeepers in new media law.

Media law itself, dealing as it does with things like public service broadcasting and the fair use of public resources, has a nuanced and well-developed concept of culture that remains useful in an era of 'Internet law'. While much of the media law approach may be a result of necessity rather than altruism (resulting from factors such as spectrum scarcity), it is necessary, I believe, to question reports of 'new media' taking the place of old by asking whether the regulatory systems that control new media (and in particular the role of those who control access to distribution systems in such system) are similarly sensitive to cultural diversity and freedom of expression. I have argued in this paper that the potential for cultural monopolisation through the use of control points should at least cause us to consider whether aspects of new media applications may facilitate the restriction of freedom of expression in certain circumstances.

The true lesson of discussions of power and censorship in 'Web 2.0' is that whatever solutions are developed must be relevant to the 'average' user. Traditional media regulations can be focused on a small number of producers, and early Internet law on the minority of persons engaged in Internet transactions and interactions, but the modern Internet media environment includes a range of users and creators - predominantly young and perhaps outside the traditional understandings of Internet users as in the case of Usenet or early role-playing games. The model, maybe, should be a mixture of moderately protectionist consumer law (commonplace in even the most capitalist and liberalised of economies), which is sensitive to human rights issues, and community-driven solutions – but relying on neither in isolation.

When Internet regulation is equated with a particular issue of controversy (whether domain names or terrorism), or indeed when dealt with in total isolation from all preceding legal and political debates, cyberlaw may seem bizarrely detached from reality. On the contrary, I believe that the everyday issues of cyberlaw (and new legislation in particular) can serve to *illustrate* rather than *negate* questions like: can corporations guarantee free speech?;

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<sup>90</sup> A Khachaturian, 'The new cultural diversity convention and its implications on the WTO international trade regime: a critical comparative analysis' (2006) 42 Texas Int'l LJ 191.

<sup>91</sup> A Keen, *The Cult Of The Amateur* (London: Nicholas Brealey, 2007).

what is the relationship between access to media and freedom of expression; what are the cultural consequences of corporate policies? In our consideration of legal issues, we are often open to influences from Internet scholars, in talking of things like networks and code; to critical media studies, perhaps less so.<sup>92</sup> The message of Internet law is by no means a foregone conclusion but in considering regulatory options, being aware of such dangers can surely, to borrow the words of Google, 'do no harm'.

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<sup>92</sup> In terms of critical legal studies, though, Lessig's brief reference (in a discussion on regulation and regulability) to Roberto Unger's work on law and politics, though, is a tantalising and intriguing one. Lessig (2006) (n 12), 78. Murray's argument for 'socio-technical-legal' studies deserves further consideration, too.